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Common Elements and Differences in Provisions for Compulsory School Attendance

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COMMON ELEMENTS AND DIFFERENCES IN PROVISIONS FOR COMPULSORY SCHOOL ATTENDANCE

by

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CHAPTER I

INTRODUCTION

Public opinion in the early decades of the last century brought about the establishment of free public schools. From this idea grew the corollary that all children attend school. The transition of schools from the status of an opportunity for those who chose to accept it to a required experience for all children, brought with it a flood of litigation. Such questions arose as to where the rights and responsibilities of the school authorities began and ended. Questions arose also concerning the responsibilities and rights of parents and pupils themselves. The answering of these questions has been and still is one that is fraught with personal conflict and one that frequently faces the courts. The long and serious contest to write compulsory school attendance laws upon the statute books of every state ended in 1918, but it left to the future many problems to be solved. The constitutionality of such legislation has been attacked in a great number of states. The constitutional objection raised is that by compelling school attendance the individual liberty guaranteed by the Fourteenth Amendment of the United States Constitution is unreasonably infringed. In the main, the enactment of compulsory attendance laws is held to be a valid exercise of the police power of the state, yet much remains to be desired in the way of assuring full attendance of those who are within the jurisdiction of the state.

I. BACKGROUND OF THE STUDY

When by the Tenth Amendment of the Federal Constitution, each state of the Union had the right and the responsibility to organize its education system, the way was opened for establishing the beginnings of State policy with reference to public education. As a result of the authority of each State for its own educational program, practices and policies differ widely among the several states in many respects. Yet in the midst of differences there are also common elements of development. One such common element is compulsory school attendance laws. The individual States soon realized that it was one thing to provide by law tax-supported schools for all children, but quite another to get all children privileged to attend school to take advantage of such opportunity. When persuasion failed to obtain the desired attendance, the citizens began to look to the State for the establishment of legal compulsion that would correct this situation. As a consequence, State legislatures prescribed legal regulations for compelling school attendance. Thus, the authority for requiring the attendance of children at school was established as a state prerogative.

II. THE PROBLEM

An examination of the background of compulsory attendance laws by the States indicates two rather significant facts. First, certain trends may be seen in the historical development of compulsory school

attendance laws. Originally, in the early history of compulsory education, both in law and in practice, emphasis was placed upon compulsion--the prosecution of the offender and the imposition of a penalty in the form of a fine. If public sentiment was such that convictions were doubtful or if enforcement was delegated to an ex-officio attendance official without additional remuneration, the law was in abeyance. Even with these means of enforcement, slight attention was given at first to the improvement of conditions that were causing non-attendance. Rapid progress is being made in many states in the shift of emphasis from penalties imposed for violations to preventive measures. There is a growing recognition of the fact that non-attendance and irregular attendance of the present, as different from the history of compulsory education, are in most cases due to determinable and removable causes.

The second implication of the historical background of universal school attendance is also pertinent to this study. That is in the enactment and enforcement of compulsory attendance legislation, it is sought to strike a balance between the rights of the individual and those of the state. The individual is obligated to sacrifice a measure of action for the good of the state. On the other hand, there is a point beyond which the state may not go without violating the rights guaranteed by the Fourteenth Amendment of the Unites States Constitution. That point cannot be determined abstractly since it is determined by the reasonableness of the restriction sought to be

imposed in each case, and reasonableness is a matter determined by the courts. Most frequently the courts must exercise their judgment concerning specific problems that arise in areas of age, health, religion, transportation, transfer, race or color.

Statement of the problem. The purpose of this study is to discover common elements and differences in provisions for compulsory school attendance as reflected in constitutional provisions, statutory enactments and court decisions in the several states. Special attention is given five significant aspects involved in enforcement of compulsory attendance legislation. They are: (1) To whom applicable (2) Age (3) Home tutoring (4) Transportation (5) Health.

Limitations of the study. Certain limitations must be considered. That which is law today may not be law tomorrow. Although the state legislatures generally convene every two years, the legislation itself is subject to constant re-interpretation and modification by the courts. But while the details of the study may be subject to change, it is not probable that the major provisions of the laws will change significantly for a few years at least.

The study is further limited by the fact that many areas properly included in the field of compulsory school attendance legislation have been omitted. Truancy, indigency and fees, power of administrative boards, are not included because they are studies in themselves. Not all the statutes of all the states have been

enumerated. Rather, where possible a statute which seems to be representative of a state has been analyzed.

III. ORGANIZATION OF THE STUDY

The method of historical research has been used in making this study. The data are present in narrative form. Chapter One gives a general history of compulsory attendance legislation and court decisions. The next chapter is concerned with five significant areas involved in the enforcement of compulsory attendance laws. The final chapter summarizes common elements and differences in provisions of compulsory attendance laws in the various states.

CHAPTER II

ASPECTS INVOLVED IN ENFORCEMENT OF COMPULSORY ATTENDANCE LEGISLATION

I. TO WHOM COMPULSORY ATTENDANCE LAWS APPLY

The persons who are within the purview of a compulsory attendance statute generally depends upon the contents of the statute and the way it is construed. As the statutes vary somewhat from state to state, so will the categories of persons who are subject to the statute vary. However, since the variation is usually slight, for the purposes of this study the laws and interpretations of general usage will be employed.

The Virginia statute on compulsory attendance provides that "Every parent, guardian or other person in the Commonwealth, having control or charge of any child or children . . . shall send such child . . . to a . . . school . . ."[1] Some questions or disputes have arisen as to what is meant by the phrase "Every parent, guardian or other person." It has been held that compulsory attendance statutes apply to aliens as well as citizens.[2] It has further been held to apply to a superintendant in charge of a home for homeless children.[3]

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[1] Va. Code §22-251 (1950).

[2] In re Children of Aliens, 17 Pa. Dist. 1080, 34 Pa. Co. 62 (1921).

[3] State ex rel. Johnson v. Cotton, 71, 67 S.D. 63, 289 N. W. (1939).

There are a limited number of exceptions to the flat rule of compulsory attendance wherein persons are excused from complying with the law. As a general rule, exemptions are granted for persons of ill health, ones who live a long distance from school and in some cases because of the economic condition of the family. Virginia, having a seemingly typical statute, makes the following exceptions:

> . . . This article shall not apply to children physically or mentally incapacitated for school work, nor to children suffering from contagious or infectious disease . . .; nor to children under ten years of age who live more than two miles from a public school . . .[4]

and in a related statute:

> . . . parent, guardian, or other person having control of a child is unable to provide the necessary clothes in order that the child may attend school, such parent, guardian, or other person shall not be punished . . .[5]

Thus it can be seen that every person within the jurisdiction of the state is subject to the compulsory attendance law with a few exceptions.

At this place, the writer wishes to emphasize one important point. The compulsory attendance laws do two things: first, they make it a duty for the child to attend school, and second, they create a liability on the parent or other person having control of the child to assure that the child does attend school.

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[4] Va. Code §22-253 (1950).

[5] Va. Code §22-273 (1950).

II. MINIMUM AND MAXIMUM AGE LIMITS

To be effective, a compulsory school attendance statute must operate within certain periods of a child's life. In other words, the statute must specify at what age a child is compelled to start to school and also at what age he is permitted to leave school.

We are so accustomed to children entering school at the age of six that it may not be known that this is not the required starting age in a great majority of the states. There are only three states with a legally required minimum starting age of six.[6] The usual minimum age of compulsory attendance is seven--this being the provision in thirty-six states. In the remaining nine states, the minimum age is eight.[7] In Virginia the minimum starting age is seven, according to the Virginia code: "Every parent . . . having control or charge of any child . . . who have reached the seventh birthday, shall send such child . . . to a public school . . ."[8]

Just as there is a required minimum age at which a child must enter school, there is generally a required legal age which he must attain before he will be permitted to leave school. Again there is a variance from state to state as to what is the maximum age. In the

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6 U. S. Office of Education Circular 278 (1950).

7 Ibid.

8 Va. Code §22-251 (1950).

majority of states (40) it is sixteen; in four states it is seventeen, and in four states it is eighteen.[9] Virginia again goes along with the majority of the states as regards maximum legal age:

> The period of compulsory attendance shall commence at the opening of the first term of school which the pupil attends and shall continue until the close of such school for the school year or until the pupil reaches his or her sixteenth birthday.[10]

Table I on page 10 lists the states according to the minimum and maximum age limits. Table II on page 11 shows the nine different school attendance groups among the states. The forty-eight states are listed according to ages within which school attendance is required.

For the purpose of determining how many years a child is required to remain in school, the important thing is not what is the maximum or the minimum age, but the amount of time which lies between the two. Table III on page 12 shows the number of years a child is required to remain in school in each of the forty-eight states not considering the exemptions from school attendance granted by many states. These exemptions are shown in a later table.

On the face it would appear that the number of years of required attendance can be determined simply by subtracting the minimum age from the maximum. However, it is not that simple because in all but nine states the child can leave school at an earlier age if he has completed a specified course of study. In twenty-one states this is

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9 U. S. Office of Education Circular 278 (1950).

10 Va. Code §22-251 (1950).

TABLE I

MINIMUM AND MAXIMUM SCHOOL ATTENDANCE AGE LIMITS*

36 States require attendance beginning at 7 years of age:		40 States require attendance until 16 years of age:	
Alabama	Nebraska	Alabama	Mississippi
Arkansas	Nevada	Arizona	Missouri
Connecticut	New Jersey	Arkansas	Montana
Delaware	New York	California	Nebraska
Florida	North Carolina	Colorado	New Hampshire
Georgia	North Dakota	Connecticut	New Jersey
Idaho	Oklahoma	Delaware	New York
Illinois	Oregon	Florida	North Carolina
Indiana	Rhode Island	Georgia	Oregon
Iowa	South Carolina	Idaho	Rhode Island
Kentucky	South Dakota	Illinois	South Carolina
Louisiana	Tennessee	Indiana	South Dakota
Maine	Texas	Iowa	Tennessee
Maryland	Vermont	Kansas	Texas
Massachusetts	Virginia	Kentucky	Vermont
Mississippi	West Virginia	Louisiana	Virginia
Missouri	Wisconsin	Maryland	Washington
	Wyoming	Massachusetts	West Virginia
		Minnesota	Wisconsin
		Michigan	Wyoming
3 States require attendance beginning at 6 years of age:		4 States require attendance until 17 years of age:	
Michigan	New Mexico Ohio	New Mexico	North Dakota Maine Pennsylvania
9 States require attendance beginning at 8 years of age:		4 States require attendance until 18 years of age:	
Arizona		Nevada	
California		Ohio	
Colorado		Oklahoma	
Minnesota		Utah	
Montana			
New Hapmshire			
Pennsylvania			
Utah			
Washington			

U. S. Office of Education Circular 278 (1950).

TABLE II

DIFFERENT SCHOOL ATTENDANCE AGE GROUPS AMONG THE SEVERAL STATES*

AGES WITHIN WHICH SCHOOL ATTENDANCE IS REQUIRED:	
32 States require attendance between 7 and 16 years of age:	
Alabama	Missouri
Arkansas	Nebraska
Connecticut	New Jersey
Delaware	New York
Florida	North Carolina
Georgia	Oregon
Idaho	Rhode Island
Illinois	South Carolina
Indiana	South Dakota
Iowa	Tennessee
Kansas	Texas
Kentucky	Vermont
Louisiana	Virginia
Maryland	West Virginia
Massachusetts	Wisconsin
Mississippi	Wyoming
7 States require attendance between 8 and 16 years of age:	
Arizona	Montana
California	New Hampshire
Colorado	Washington
Minnesota	
2 States require attendance between 7 and 17 years of age:	
Maine	North Dakota
1 State requires attendance between 6 and 16 years of age:	
Michigan	
1 State requires attendance between 6 and 17 years of age:	
New Mexico	
1 State requires attendance between 6 and 18 years of age:	
Ohio	
1 State requires attendance between 8 and 17 years of age:	
Pennsylvania	
1 State requires attendance between 8 and 18 years of age:	
Utah	

* U. S. Office of Education Circular 278 (1950).

TABLE III

NUMBER OF YEARS OF SCHOOL ATTENDANCE
REQUIRED BY DIFFERENT STATES*

7 States require 8 years of school attendance:			
Arizona	Colorado	Montana	Washington
California	Minnesota	New Hampshire	
33 States require 9 years of school attendance:			
Alabama	Iowa	New Jersey	Texas
Arkansas	Kansas	New York	Vermont
Connecticut	Kentucky	North Carolina	Virginia
Delaware	Louisiana	Oregon	West Virginia
Florida	Maryland	Pennsylvania	Wisconsin
Georgia	Massachusetts	Rhode Island	Wyoming
Idaho	Missouri	South Carolina	
Illinois	Mississippi	South Dakota	
Indiana	Nebraska	Tennessee	
4 States require 10 years of school attendance:			
Maine	Michigan	North Dakota	Utah
3 States require 11 years of school attendance:			
Nevada	New Mexico	Oklahoma	
1 State requires 12 years of school attendance:			
Ohio			

* U. S. Office of Education Circular 278 (1950).

the elementary course, usually eight grades. In fifteen other states, completion of high school is required to justify non-attendance by a child under the normal leaving age.[11] Ohio allows earlier school leaving upon a determination that the child is incapable of profiting substantially by further instruction.[12] Table IV on page 14 shows the minimum education required by each state for exemption from school attendance.

At this point it would be proper to briefly mention the question as to persons attending schools who do not come within the minimum and maximum ages. As a general rule children will be admitted to school when they have attained their sixth birthday, but not before. Persons above the maximum age will usually be admitted up to the age of twenty and if older than twenty, may be admitted within the discretion of the school board. The following excerpt from the Virginia statute appears to be typical of the many various state laws studied:

> The public schools, except as otherwise provided, shall be free to all persons between the ages of six and twenty years . . . persons living in a county or city, and the school system of which is operating on an annual promotion basis, who have reached their sixth birthday on or before September thirteenth of any year, and persons living in a county or city, the school system of which is in operation on a semi-annual basis, who have reached their sixth birthday on or before September thirteenth or on or before March first of any year, may, in the discretion of the school board, be admitted to primary grades . . . The school

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[11] U. S. Office of Education Circular 278 (1950).

[12] Ohio Code §3331.01 (1953).

TABLE IV

SUMMARY OF MINIMUM EDUCATION REQUIRED FOR EXEMPTION FROM SCHOOL ATTENDANCE*

21 States require completion of the elementary school course (usually eight grades) in order to be exempted from school attendance:

Arizona	Iowa	Montana
Arkansas	Kansas	New Hampshire
Colorado	Maine	North Dakota
Connecticut a/	Massachusetts a/	South Dakota
Delaware b/	Minnesota	Utah a/
Florida a/	Mississippi	Washington
Indiana a/	Missouri	Wyoming

1 State requires completion of the 9th Grade: Texas

1 State requires completion of the 10th Grade: South Carolina

1 State requires completion of the "first two years of the junior or senior high school course": Vermont

15 States require completion of the high school:

Alabama	Nevada	Oregon
California	New Mexico	Pennsylvania
Georgia	New York	Tennessee
Kentucky	Ohio c/	West Virginia
Nebraska d/	Oklahoma	Wisconsin

9 States appear to have no express provisions for exemption from school attendance solely on account of education attained:

Idaho	Maryland	North Carolina
Illinois	Michigan	Rhode Island
Louisiana	New Jersey	Virginia

a/ Eighth grade, 14 and lawfully employed.

b/ In the city of Wilmington completion of highschool is required.

c/ Sixth grade, 14 and lawfully employed.

d/ High school or highest grade maintained in district.

e/ Ohio allows earlier school leaving if the child is incapable of profiting by further instruction.

* U. S. Office of Education Circular 278 (1950).

> board, in its discretion, may admit as pupils into any of the public schools, person above the age of twenty years under regulations to be prescribed by the State Board.[13]

Compulsory attendance statutes are designed to require parents or other persons having custody of children to have the children attend school during the required period beginning and ending with the school year as the particular statute so provides. Generally speaking, the laws are not designed to require attendance at school up to a certain age. The object appears to be that children shall acquire or be exposed to the chance to acquire a certain amount of knowledge. If the child is bright enough to achieve this end quickly, well and good. If he is dull, he will be kept at the task until he has reached the maximum legal age, and then be excused regardless of how little he has learned.

III. HOME INSTRUCTION

Having seen that, with a few exceptions, a child between the minimum and maximum legal ages must attend school, the question then arises as to what kind of school or quasi-school must he attend. Before delving into this matter, the purposes for compelling a child's attendance at school should be determined. Obviously, it is not merely to provide a place for the children to spend their childhood days. Nor is it just for the sake of going to school.

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[13] Va. Code §22-218 (1950).

The primary purpose of attending school is to receive scholastic and social education. It is to promote the intelligence of our citizens of tomorrow.

Now let us examine the matter more closely and ask ourself this question. "Are the compulsory school attendance laws solely for the benefit of the children?" The answer is a definite no! The state has a fundamental interest in its citizens and especially in its children because they will be the citizens of tomorrow.

No one will deny that it is a fundamental right of a parent to control and rear his children. It is the natural right of the parent to control the upbringing of the child and his natural duty to educate the child.[14] Where then does the state get the power to override that parental right to some degree? The answer is the police power of the state to provide for the common welfare. Recognizing this, where, then, is the public interest served by compulsory education which justifies overriding the parent's right to control his children? As stated in the principal case of Fogg v. Board of Education:[15]

> The primary purpose of the maintenance of the common school system is the promotion of the general intelligence of the people constituting the body politic and thereby to increase the usefulness and efficiency of the citizens, upon which the government of society depends.

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[14] People v. Levinson, 404 Ill. 574, 90 N. E. 2d 213 (1950).

[15] 76 N. H. 296, 82 A. 173 (1912).

> Free schooling furnished by the state is not so much a right granted to pupils as a duty imposed upon them for the public good. If they do not voluntarily attend the schools provided for them, they may be compelled to do so. While most people regard the public schools as a means of great personal advantage to the pupils, the fact is too often overlooked that they are governmental means of protecting the state from the consequence of an ignorant and incompetent citizenship.

Having established that it is a right of the state to see that children are educated the next consideration will be whether the state has sufficient interest in the means or method through which instruction is to be given.

Since the historic decision of the Supreme Court in Pierce v. Society of Sisters[16] there is no longer any question as to whether a state may deny a parent the right to send his child to a private or a denominational school. The court held a state could not deny such a right. It said:

> ...the fundamental theory of liberty upon which all governments in the Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only . . .[17]

The question is so firmly settled that it will not be further discussed here.

A difficult, and, perhaps the most fundamental point for consideration is whether children must be sent to school or may a parent instruct his child at home or procure private tutoring. The great

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16 268 U. S. 510 (1925).

17 Id. at 535.

majority of the cases on this point deal with the question whether providing home or other "non-school" instruction is compliance with compulsory attendance laws.[18] This is the point where the state's exercise of power is likely to collide with the parental right to control his children.

By the legislative judgment of most states the public interest stops short of the requirement that children be educated at a school. By a statute, a majority of the states expressly recognize the propriety of private instruction. The concern of these states is that if instruction is privately given, it must not be inferior in content to that which is available in public schools. Virginia again is with the majority of states by providing that:

> . . . parent . . . shall send such child, or children, to a public school, or to a private, denominational or parochial school, or have such child or children taught by a tutor or teacher of qualifications prescribed by the State Board and approved by the division superintendent in a home . . .[19]

The profitable way in which to consider the problem of home instruction or private tutoring would be to study some of the leading court decisions along this line.

The law in Oklahoma is that children must attend public

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[18] Hamilton, R. R., "Compulsory Attendance Laws--Home Instruction," The National School Law Reporter, Vol. 1, No. 19. Laramie, Wyoming: University of Wyoming Press, 1951.

[19] Va. Code §22-251 (1950).

schools unless other means are provided. The Oklahoma court decided in Wright v. State[20] that on the facts of the case, children were being given efficient instruction at home by their parents and that private teachers did not have to have the same qualifications as teachers in public schools, in absence of statutory provision otherwise.

The New Jersey law[21] requires attendance at a public school or "equivalent instruction elsewhere than at school." Two lower courts in New Jersey are of the opinion that in the conditions of modern life instruction at home lacks qualities essential to the development of needed attributes of citizenship.

In Stephen v. Bongart[22] and in Knox v. O'Brien[23] the parents were fined for non-compliance with the compulsory attendance statute. The courts stated that where the children were instructed at home the lack of free association with other children which is present at a public school prevented them from receiving education that was equivalent.

Under a statute permitting instruction by a qualified teacher it has been held that the mere fact that the parent has had a public

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20 21 Okla. Crim. App. 430, 209 P. 179 (1922).

21 N. J. Stat. Ann. §18:14-4.

22 15 N. J. Misc. 80, 189 A. 131, 137 (1937).

23 7 N. J. Sup. 608, 72 A. 2d 389 (1950).

school education does not constitute a sufficient showing of due qualification,[24] and a Virginia case holds that the religious belief of parents that it is their duty to teach their children at home does not itself exempt them from compliance with a compulsory attendance statute.[25]

There are several other views which the different jurisdictions take in allowing or disallowing home tutoring. A holding in Indiana was that a father who sent his child to a teacher formerly employed in the public schools who instructed her in the subjects there taught had complied with the compulsory attendance laws requiring attendance at public, private, or parochial schools; and this was the holding even though the teacher neither had nor sought other pupils and did not advertise as a school. The court said that the law had nothing to do with the way or the place where a child should be educated. The result to be obtained and not the means nor matter of attaining it was the goal which the lawmakers were attempting to reach.[26] In effect, since the compulsory attendance statute did not provide for private or home tutoring, the court held that this was a school and satisfied the statute requiring a child to attend a school. To strengthen this position a recent Illinois case[27] held that a child

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[24] Pa. Commonwealth v. Gallen, 25 Pa. Dist. 410, (1922).

[25] Rice v. Commonwealth, 188 Va. 224, 49 S. E. 2d 342, 3 A. L. R. 1392. (1948).

[26] State v. Peterman, 32 Ind. App. 665, 70 N. E. 550 (1904).

[27] People v. Livinson, 404 Ill. 574, 90 N. E. 2d 213 (1950).

instructed at home by her mother was attending a "private school" within the intent of the compulsory attendance statute, saying in its opinion that the object of the law is that children shall be educated, not that they be educated in any particular manner or place.

There is, however, an even more recent case in a different state in direct conflict with the last mentioned case. In the California case of People v. Turner[28] the parents were desirous of educating their children at home. They were prosecuted and convicted under the compulsory attendance statute. Among other holdings, the court refused to consider the term private school as applicable to the home where the children were being taught by the parents or tutor. The inference to be drawn from the construction of the statute was considered clear; schools did not include the home.

The California and Illinois cases exemplify two different approaches. The California approach follows literally legislative fiat, while the Illinois view looks to the purpose of the law. The latter seems to be the prevailing legislative and judicial view.

There is still another view, however, under which a state can justifiably preclude private instruction. The court of New Hampshire allows such a restriction on the ground that the state is entitled to supervise education, however given, and that it is not feasible to supervise home instruction or private tutoring.[29]

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28 121 Cal. App. 2d 861, 263 P. 2d 685 (1953).

29 State v. Hoyt, 85 N. H. 38, 156 A. 170 (1929).

To this date there is no decision in the Federal Supreme Court on the question of whether or not a state can preclude the educating of a child in the home or by a private tutor. The prevailing view among the many states allows private instruction in lieu of attending a public or private school while only a few states deny that right. If an when the Supreme Court does decide the question, it will be a vitally important decision affecting the lives of many people either directly or indirectly.

One thing more needs to be said before leaving this important point. In most states which permit private or home instruction, it is regulated to some extent. Quite common among such regulations is the requirement that instruction be equivalent to public instruction and that the private tutor be certified or meet any qualificational standards set by the state.

IV. TRANSPORTATION

An important practical phase of compulsory school attendance is the matter of getting children to and from school. Every school day there are millions of pupil school miles which must be traveled on the way to school and the return home. The distances traveled by the individual students vary from a few blocks to several miles and this distance must be traveled twice a day five days a week throughout the school year. Table V on page 23 is presented for the purpose of showing that the numbers of pupils transported at public expense

TABLE V

NUMBER OF PUPILS TRANSPORTED AT PUBLIC EXPENSE AND EXPENDITURES FOR TRANSPORTATION: 1929-30 TO 1949-50*

Year	Number of pupils transported at public expense	Expenditure of public funds for transportation excluding capital outlay (thousands)
1929-30	1,902,826	54,823
1931-32	2,419,173	58,078
1933-34	2,419,173	53,908
1935-36	3,250,658	62,653
1937-38	3,769,242	75,637
1939-40	4,144,161	88,283
1941-42	4,503,081	92,922
1943-44	4,512,412	107,754
1945-46	5,056,966	129,756
1947-48	5,854,041	176,265
1949-50	6,947,384	214,504

*The Biennial Survey of the United States: 1949-50.

TABLE VI

NUMBER OF PUPILS TRANSPORTED AND EXPENDITURES FOR TRANSPORTATION 1949-50*

Enrolled pupils transported in the Continental U. S.		Expenditure of public funds for transportation excluding capital outlay	Average cost per pupil transported	Per cent transportation is of total expense
Number	Per Cent			
6,947,384	27.7	214,503,541	30.88	4.6

*The Biennial Survey of the United States: 1949-50.

has greatly increased in the twenty year period from 1929-1950. Table VI which follows on page 24 gives more detailed data for the year 1949-50. It is evident from these tables that pupil transportation has developed into one of the most costly of school services. It is not surprising, therefore, that it should be the subject of a great deal of litigation.

To make a compulsory school attendance law effective it must be possible for every child to be able to reach the school each day at a designated hour and return home within a reasonable time after school is over. The practical problem particularly concerning children who live several miles from the school which they are to attend is presented here. The answer, of course, is pupil transportation of some type. In this present day of modern improved roads and transportation facilities the problem of pupil transportation is not too great in some recognizable aspects as it was in the not too distant past.

At the turn of the century provisions for the transportation of pupils at public expense could be found in only a few jurisdictions. Consequently, there were few cases decided by the courts on the issue of free public transportation. As the number of states increased that provided for pupil transportation, so did litigation on the issue of pupil transportation increase. The increased amount of litigation is indicated by the number of cases reported on the subject in the Decennial Digests which is set forth in Table VIII on page 26.

TABLE VII

NUMBER OF CASES REPORTED IN THE DECENNIAL DIGESTS*

DIGEST	CASES REPORTED
First Decennial Digest 1897-1906	2 Cases Reported
Second Decennial Digest 1906-1916	14 Cases Reported
Third Decennial Digest 1916-1926	35 Cases Reported
Fourth Decennial Digest 1926-1936	80 Cases Reported
Fifth Decennial Digest 1936-1946	60 Cases Reported

* The Decennial Digests contain a complete digest of all decisions of the state and federal courts as reported in the National Reporter System and the State Reports.

The peak in the number of cases on pupil transportation was reached between 1926-1936. This is so even though the number of pupils being transported has been increasing continuously since that time. The decrease in the next decade may be due to a variety of factors, such as greater clarity and specificity in statutes authorizing pupil transportation, and a firmer establishment of legal principles.

In early cases, the constitutionality of legislation providing for pupil transportation was questioned on the grounds of discrimination by the state, in that some pupils were transported at public expense while others were not. These objections were thoroughly disproved in the beginning by the courts[30] and have not been raised in many years. The legal principle evoked to answer these objections was that transportation laws are not discriminatory, nor do they violate uniformity of public school operation, because any child attending public schools may bring himself within the scope of the transportation law by meeting the specified standards.

The big problem of pupil transporation involves the school district's power to provide for transportation. A school district must have authority, either express or implied, to make such provision or they are without power to act.

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[30] Bufkin v. Mitchell, 106 Miss. 253, 63 So. 458 (1913). Cross v. Fisher, 132 Tenn. 31, S. W. 43 (1915).

The establishment of the public school systems and compulsory school attendance laws are purely statutory and therefore must be strictly construed. As a result the cases in which the courts have upheld implied authorization for school districts to provide transportation at public expense are rare.

For example, no authority to provide for transportation of pupils can be implied from the duty imposed on school trustees to secure to the children in their district the right and opportunity of equal education,[31] or from a statute authorizing boards to do all things needful and necessary for the maintenance and success of the district and the promotion of thorough education of the children thereof,[32] or where a district is not a consolidated school district, from a statute authorizing trustees of a consolidated school district to use school funds for transportation,[33] nor do trustees of a school district have power to act under a statute authorizing the county board to furnish transportation.[34]

However, there are a few instances where authority to transport has been implied. Implied authority to provide for transportation has been found in a case where a statute authorizing the estab-

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[31] Mills v. School Directors Cons. Dept. No. 532, 154 Ill. App. 119 (1910).

[32] Township School Dist. of Bates, etc. v. Elliot, 276 Mich. 575, 268 N. W. 744 (1936).

[33] Hendrix v. Morris, 127 Ark. 222, 191 S. W. 939 (1917).

[34] MacKenzie v. Bd. of Ed., 58 GA. 892, 124 S. E. 721 (1924).

lishment of separate schools for white and colored children cannot be met except by transportation or by a wasteful expenditure of public funds in the construction and equipment of unnecessary schools,[35] and in a case where statutes granted to an independent school district "the usual power of corporations for school purposes" and providing that common school districts have authority to instruct the board in matters pertaining to the management of the school,[36] and from provisions of the compulsory attendance law exempting persons living a certain distance from a school unless free transportation is provided, especially where school buses are expressly referred to in the automobile licensing law as being exempt from certain of its provisions.[37]

Virginia falls in the latter category where authority to provide transportation is implied from the compulsory attendance law where it exempts persons if transportation is not provided. The Virginia code provides that:

> The provisions of this article shall not apply to . . . children under ten years of age who live more than two miles from a public school, unless public transportation is provided within one mile of the place where such children live; nor to children between ten and sixteen years of age who live more than

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35 Foster v. Bd. of Ed., 131 Kan. 160, 289 P. 959 (1930).

36 Ibid.

37 Malounek v. Highfill, 110 Fla. 1428, 131 So. 313 (1930). Note: A county board of public instruction has the implied power to employ persons to transport pupils to and from central public schools by reason of the necessity which the centralization of school implies. Williams v. Bd. of Pub. Instruction, 133 Fla. 624, 182 So. 837 (1938).

> two and one-half miles from a public school, unless public transportation is provided within one and one-half miles of the place where such children live.[38]

Thus, in Virginia, the authority for pupil transportation is implied from the statute granting exemption to children who live a certain distance from school if transportation is not provided.

The great majority of jurisdictions today do not rely upon implied powers for pupil transportation, but expressly provide for it by statute. Even this, however, does not solve their problems.

The states expressly authorising free transportation to pupils residing in school districts have variations in their statutory provisions and a single answer could not be given which would apply to all states, or even all districts within a state. Some statutes provide for state supervision and control. The most important question, at present, concerns the conditions under which a school district is compelled or authorised to provide transportation. In some instances the statutes specifically require the school districts to furnish free transportation; in other the law makes the furnishing of transportation optional with the school board, and in other jurisdictions the duty is mandatory upon the board only under certain conditions. Table VIII on page 31 lists each state and shows how each state makes provisions for transportation.

Under statutes where transportation of students is mandatory,

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[38] Va. Code §22-253 (1950).

TABLE VIII

STATUTORY PROVISIONS FOR PUPIL TRANSPORTATION INVOLVING SCHOOL MATTERS

State	State requirement of distance pupil must live from school before eligible for transportation	Where duty to provide transportation by state law is mandatory	Where authority to provide for transportation is discretionary	Amount of discretion allowed
Alabama	2 Miles	Local Boards		None
Arizona	None	None	With Board of Trustees of School District	When deemed to be in the best interest of pupils
Arkansas	None	None	Board of Directors of School Districts	When necessary, safe and convenient
California	None	None	School Districts	When deemed necessary
Colorado	None	None	Local Board of Education or High School Committee	When in their opinion transportation is required
Connecticut	None	None	Local Board of Education	When reasonable and desirable
Delaware	None	None	State Board of Education	Complete
Florida	None	None	County Board of Education	Complete
Georgia	None	None	County Board of Education	Complete
Idaho	1½ miles	Local Boards	State Board of Education on distances less than 1½ miles	Complete
Illinois	1½ miles	Local Boards		
Indiana	5/8 mile to children under 12	Local Boards		
	1½ miles to all others	Local Boards		
Iowa	2 miles	Local Boards		
Kansas	2½ miles	Local Boards		

TABLE VIII (Continued)

STATUTORY PROVISIONS FOR PUPIL TRANSPORTATION INVOLVING SCHOOL MATTERS

State	State requirement of distance pupil must live from school before eligible for transportation	Where duty to provide transportation by state law is mandatory	Where authority to provide for transportation is discretionary	Amount of discretion allowed
Kentucky	Where elementary pupil lives more than reasonable walking distance from school	State Board of Education for High School pupils living more than reasonable walking distance from school		To determine reasonable walking distance and to provide transportation for high school pupils
Louisiana	1 mile	State Board of Education	State Board of Education	May provide transportation for pupils living more than 1 mile from school
Maine	None	None	Superintending School Committee	When in their judgment it is necessary
Massachusetts	2 miles	Local Boards		
Michigan	None	Board of Education in Township School District		To determine what is adequate
Maryland	None	None	County Board of Education	When necessary and practical
Minnesota	None	None	School Board of District	Complete
Mississippi	None	None	State Board of Education	Depends on Average Daily Attendance
Nebraska	3 miles	Local Boards	School Boards	May give travel expense in lieu of transportation

TABLE VIII (Continued)

STATUTORY PROVISIONS FOR PUPIL TRANSPORTATION INVOLVING SCHOOL MATTERS

State	State requirement of distance pupil must live from school before eligible for transportation	Where duty to provide transportation by state law is mandatory	Where authority to provide for transportation is discretionary	Amount of discretion allowed
Montana	1½ miles	Local Boards		
New Jersey	None	None	District Board of Education	May make rules and regulations
Nevada	2 miles	Local Boards	Local Boards	In all other cases
New Hampshire	2 miles	Local Boards	None	
New Mexico	None	None	Director of Transportation	Complete
New York	None	None	Trustees or Board of Education	To determine when remote or for best interest of child
North Carolina	1½ miles	Local Boards	None	
North Dakota	2 miles	Local Boards	Local Boards	To pay for transportation in lieu of furnishing transportation
Ohio	2 miles	Local Boards	County Board of Education	Shorter distances when deemed necessary
Oklahoma	1½ miles	Local Boards	None	
Oregon	None	None	District School Boards	Distance fixed by vote
Pennsylvania	1½ miles	Local Boards	None	
Rhode Island			State Board of Education	Complete
South Carolina	1½ miles	Local Boards		
South Dakota	4 miles	Local Boards		
Tennessee	1½ miles	Local Boards		
Texas	2½ miles	Local Boards	Board of Trustees	In all other cases

TABLE VIII (Continued)

STATUTORY PROVISIONS FOR PUPIL TRANSPORTATION INVOLVING SCHOOL MATTERS

State	State requirement of distance pupil must live from school before eligible for transportation	Where duty to provide transportation by state law is mandatory	Where authority to provide for transportation is discretionary	Amount of discretion allowed
Utah	None	None	Local Boards of Education	May furnish transportation to and from school
Vermont	None	None	Local Board of Education	When reasonable and necessary
Virginia	1½ miles for children under 10 years 2½ miles for children over 10 years old	Local Boards	None	
West Virginia	2 miles	Local Boards	None	
Wisconsin	2 miles	Local Boards	None	
Wyoming	None	None	County Committee	Complete
Washington	4 miles	Local Boards	None	None

the law should be liberally construed to give effect to the legislative intent and in addition be construed so that no child entitled to transportation will be denied that privilege. No discretion is conferred upon a school board to either expand or contract this delegation of duty.

A great deal of litigation has developed where school boards have attempted to evade the statutory duty of furnishing transportation to certain children because of the expense that would be involved. In an illustrative case, Munn v. Troy School District,[39] a school board did not provide transportation for a child because of the high cost involved in establishing a bus route for one child in an isolated area. The school board had requested the parent to transport the child for compensation, which he refused to do. The court reasoned:

> It is not a question of how much it will cost this district or that district to transport this child or that child. The district has no right to say it will transport certain children but to transport the remainder will be too costly--it is no excuse that plaintiff refused to contract to convey his own children. There was no statutory duty compelling him to do so.[40]

The rationale in this case is that, unless the statute specifically authorized board discretion in such matters, the courts will not permit it.

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[39] 240 Iowa 1057, 38 N. W. 2d 583 (1949).

[40] Id. at 1061-1063, 38 N. W. 2d 583, 595, 596.

In another case, a school board failed to list in its budget under the transportation fund, or to include in its general fund, certain costs of transportation which could have been anticipated at the time when the budget was being prepared. The court ruled that this fact did not relieve the school board from its statutory liability to compensate persons for transporting children to school.[41]

In another case where pupil transportation was mandatory, the school board designated a certain school for the attendance of children who were transported to a certain embarkation point. The court decided that they were entitled to transportation to the same embarkation point even though they chose to proceed from the point to a school of their own choice.[42]

The amount of discretion permitted the local boards of educationin providing free transportation is derived from state statutes and thus varies from state to state. The laws on free pupil transportation which are the most mandatory, so far as the local boards of education are concerned, are the ones in which the state board of education is authorized by statute to specify the regulations under which the pupil transportation is to be provided. The state boards of five states--North Carolina, Minnesota, Delaware, New Jersey and New Mexico--are so empowered. The authority for the state board of

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[41] Kimminau v. Common School Dist. No. 1, 170 Kan. 124, 223 P. 2d, 689 (1950).

[42] Alfred v. Shaw, 313 Ky. 80, 230 S. W. 2d 102 (1950).

education may be discretionary but the authority to provide or deny transportation is mandatory on the local school boards. In one of these states any regulations which a local board may specify must conform to those of the state board of education.[43]

In some instances the law makes the providing of transportation optional with the local boards of education. Although the entire area of free pupil transportation does not come within discretionary authority of local boards of education, there is usually some degree of discretion allowed. In approximately two-thirds of the states local boards can act in various instances using their own discretion. Often the law is mandatory with regard to certain pupils, permissive with regard to certain pupils, and may make no mention of the remainder.

If the law is clear and specific in its delegation of discretionary authority to school boards in regard to the furnishing of pupil transportation, the need for litigation on their actions is almost negative. Where the board exercises its discretionary authority honestly, it will be sanctioned in a court even where there was evidence that the board's action was not satisfactory or beneficial to certain residents in the school district. Their action under the discretionary power to provide transportation is not subject to judicial control and in the absence of evidence that the board acted in an arbitrary or capricious manner, or in other words, abused their

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[43] Rankin v. Board of Education, 135 N. J. L. 299, 41 A. 2d 194 (1947).

discretion, the court will not interfere.[44]

Many cases could be mentioned in which the courts have upheld the discretionary authority of school boards in furnishing or refusing to furnish transportation to certain children. Mention of a few will suffice to illustrate the court's viewpoint on their power, given to local boards.

In the leading case of Pass v. Pickens,[45] the grammar school students in certain districts received transportation to and from the district school but the high school students, the majority of whom lived in the same district and many in the same residences with the grammar school students, were given transportation to a separate independent school. The county board of education denied bus transportation to grammar school students who wished to attend the independent school. The Supreme Court of Georgia held that such refusal by the board was not an abuse of discretion despite the claim that the students would be deprived of greater educational advantages. The court said:

> To force the defendants to do so by compulsory process of the court would be a distinct usurpation by the court of the judgment and discretion of the board of education vested in them by law.[46]

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[44] Meuhring v. School Dist. No. 21, 224 Minn. 432, 28 N. W. 2d 665 (1947).

[45] 204 Ga. 629, 51 S. E. 2d 405 (1949).

[46] Id. at 632, 407.

An Arkansas case, White v. Jenkins[47] gives a clear and concise statement of the legal principle involved. There the school district closed a white school and transported the district's grade school white children to another district while it kept three Negro schools open. This was held not to be beyond the statutory powers for the school board and not an abuse of discretion. The court said:

> It is well settled that courts may not intervene to control matters in the discretion of administrative bodies such as school boards in the absence of a showing of or abuse of such discretion. Necessarily, some latitude in the exercise of this discretion must be given to these boards. They represent the people of the locality affected and naturally are closer to the problems to be solved than any court or other agency could be.[48]

Even in some cases when discrimination results from their action, if the board has not abused its discretion, the courts will maintain their hands off policy. In Woodlawn School District No. 6 v. Brown[49] it was evident that the local school board had exercised its discretion honestly in preparing the bus schedule, but unintentional discrimination resulted. The court held that although equal facilities were not furnished to all the children in the district, the board had acted honestly and the bus schedule prepared by the board was held legally proper.

A court will not interfere in behalf of a pupil who is unable

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47 213 Ark. 119, 209 S. W. 2d 457 (1948).

48 Id. at 121, 458.

49 216 Ark. 1417, 223, S. W. 2d 818 (1949).

to walk because of physical infirmity,[50] nor can the state commissioner of education, merely because he has a quasi-judicial power in controversies affecting school districts, force school trustees who have a discretionary power in the premises to furnish transportation.[51] Where a school district has provided transportation in previous years it is not stopped thereby from discontinuing such service acting under the discretionary authority delegated to it. In Meuhring v. School District No. 31[52] the school district had provided free transportation for pupils for twelve consecutive years, but beginning with the 1945-46 school year, it discontinued service. The Minnesota Supreme Court upheld the board's action, giving the opinion that there was no abuse of discretion.

In a limited number of circumstances the interpretation of certain words or clauses of a statute comes within the school board's discretion. In a case in North Dakota[53] a statute authorized a school district to pay a transportation allowance to each family living a certain distance from the school district. The board construed the words "to each family" not to mean "to every family". The court upheld their interpretation and the school board's discretion to pay some parents according to the number of miles traveled, and to

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[50] Berry v. Barrington School Bd., 78 N.H. 30, 95 A. 952 (1915).

[51] In Union Free School Dist. No. 2, 210 N. Y. S. 439, 214 App. Div. 40 (1925).

[52] 224 Minn. 432, 28 N. W. 2d 655 (1947).

[53] Reich v. Dietz School Dist. No. 16, 55 N. W. 2d 638 (1952).

furnish transportation to other students was held legal.

In many states distance limitations are placed by statute on the furnishing of pupil transportation in that a pupil must live a specified distance from school before free public transportation will be provided. In most states placing such a limitation, the distance is usually set at two miles although there are variations. As an example, Indiana makes transportation of pupils aged six to twelve mandatory if they live at least five-eighths of a mile from school, while Washington permits transportation to union high schools only if the pupils live four miles from school.[54]

If the distance limitation is specified in terms of miles, the authority of the school board is accordingly limited by the statute and the matter is decisively settled.

The difficulty arises when distance limitations are set in vague terms such as "inaccessible,""unreasonable" or "remote." In many jurisdictions that have no specifically defined distance limitation in terms of miles placed on pupil transportation, the local board's decisions in the determination of what is reasonable or unreasonable have been litigated as a result of contentions of abuse of discretion. In all the cases the decisions have been based upon a number of existing conditions rather than upon the single one of distance. Among the factors which the school boards and the courts

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[54] Madaline K. Remmlein, The Law of Public School Administration (New York: McGraw-Hill Book Co., Inc., 1950), p. 141.

take into consideration are the age of the children to be transported, width and surface of the passageway, climate, traffic hazards, amount of traffic, and the acquaintance and experience of the children with the traffic situation. A few illustrative cases will show how the courts regard the matter.

In Kentucky the transportation law makes pupil transportation mandatory to elementary pupils who do not reside within "reasonable walking distance" of the school provided for them.

In the Kentucky case of Schmidt v. Payne[55] the board had not provided transportation for certain children. The court found that they were walking distances two to three miles over a heavily traveled road with no sidewalk or graveled road. The route crossed a narrow bridge, a railroad, and a federal highway with continuous fast-moving traffic. The court held that transportation should be furnished to those who did not live within reasonable walking distance of school and particularly where there were no sidewalks. Taking all these factors into consideration the court believed that such hazards and conditions were more decisive than the distance involved and ruled that the appellants had abused their discretion.

In a later Kentucky case[56] certain children had to travel

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[55] 304 Ky. 58, 199 S. W. 2d 990 (1947).

[56] Bd. of Education v. Bowling, 312 Ky. 749, 229 S. W. 719 (1950).

about two miles on a gravel road with no shoulders or walkways and over which about fifty cars passed each day. The court, in this case, held that, considering all the factors, the children were within a reasonable walking distance and that the board did not act in an arbitrary and unreasonable manner and therefore did not abuse their discretion.

In the latest case in point in Kentucky, Bowen v. Meyer,[57] the court of appeals upheld the action of the local board of education in their decision not to transport certain children over a highway with numerous hazards including heavy traffic. In this case, however, the decision was based on existing factors quite different from the factors considered in the two previous cases. The court said:

> In suburban areas such as this, children are exposed to the hazards of traffic in many of their outdoor activities. They will be upon the streets in play, in visiting their friends, and in going to the stores. They early in life must be trained to take care of themselves in traffic.[58]

Then the court contrasted the suburban child's familiarity with traffic situations with that of the rural child and ruled that "the hazards presented are not of such magnitude as to make it mandatory upon the board to furnish transportation."

A few states have provisions that require boards to furnish transportation to pupils living a stated distance from the school or

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[57] 225 S. W. 2d 490 (1953).

[58] Id. at 491.

to pay compensation therefor. In such instances the boards have the option of adopting either method and may provide transportation for some pupils while making a money allowance for others. As a general rule it can be said that before a person can obtain compensation for transporting children to a school in a state with an option clause, be it parent or other, he must comply strictly with the statute authorizing it.

One other aspect of pupil transportation which has not heretofore been mentioned is theelement of transportation for parochial school pupils. Table IX on page 45 is provided for the purpose of showing the number of pupils enrolled in public schools and Table X on page 47 shows the number of pupils enrolled by grade in non-public schools. Table XI on page 49 gives the number of pupils enrolled by grade in non-public schools and compares the per cent of non-public enrollment by grade with the per cent of total enrollment by grade in city public schools. As indicated by these tables, a relative large minority of today's children attend parochial schools. A topic on compulsory school attendance would be incomplete unless some attention be directed toward that element of the school systems. However, since parochial schools make up such a broad and important segment of the existing school systems that they would require a complete and independent study, only a cursory examination will be given to them in this study.

It has already been noted that attendance in a parochial school satisfies the compulsory attendance law.

TABLE IX

ENROLLMENT IN FULL TIME PUBLIC
ELEMENTARY AND SECONDARY SCHOOLS BY STATE: 1949-50*

State by Region	Total	Total Kindergarten and Elementary School Pupils	Total Secondary School Pupils
Continental U. S.	25,111,427	19,404,693	5,706,734
New England:	1,292,728	961,515	331,213
Maine	158,247	124,058	34,189
New Hampshire	71,733	53,316	18,417
Vermont	61,143	49,224	11,919
Massachusetts	632,285	453,852	178,433
Rhode Island	96,305	71,308	24,997
Connecticut	273,015	209,757	63,258
Middle Atlantic:	4,223,330	3,095,322	1,128,008
New York	1,998,129	1,457,855	540,274
New Jersey	674,915	495,140	179,775
Pennsylvania	1,550,286	1,142,327	407,959
East North Central:	4,609,842	3,477,637	1,132,205
Ohio	1,202,967	916,706	286,261
Indiana	689,808	524,208	165,600
Illinois	1,153,683	871,072	282,611
Michigan	1,069,435	809,887	259,548
Wisconsin	493,949	355,764	138,185
West North Central:	2,411,630	1,838,121	583,509
Minnesota	481,612	358,736	122,876
Iowa	477,720	364,942	112,778
Missouri	644,457	499,126	145,331
North Dakota	114,661	87,809	26,852
South Dakota	117,675	88,577	29,098
Nebraska	227,879	168,063	59,816
Kansas	347,626	260,868	86,758

The Biennial Survey of Education: 1949-50

TABLE IX (Continued)

ENROLLMENT IN FULL-TIME PUBLIC ELEMENTARY AND SECONDARY SCHOOLS BY STATE: 1949-50* (Continued)

State by Region	Total	TOTAL Kindergarten and Elementary School Pupils	TOTAL Secondary School Pupils
South Atlantic	4,060,552	3,269,350	791,202
Delaware	46,055	35,325	10,730
Maryland	335,018	269,911	65,107
Virginia	597,867	497,563	100,304
North Carolina	884,733	703,698	181,035
South Carolina	494,185	415,146	79,039
Georgia	718,037	353,241	146,708
Florida	499,836	571,329	96,595
Dist. of Columbia	96,323	74,576	21,747
West Virginia	438,498	348,561	89,937
East South Central	2,430,174	2,009,179	420,995
Kentucky	562,883	467,159	95,724
Tennessee	659,785	539,445	120,340
Alabama	680,066	555,892	124,174
Mississippi	527,440	446,683	80,757
West South Central	2,685,877	2,146,688	539,189
Arkansas	407,085	328,804	78,281
Louisiana	483,363	399,634	83,729
Oklahoma	441,263	338,797	101,466
Texas	1,354,167	1,078,453	275,714
Mountain	983,971	761,292	222,679
Montana	105,917	79,864	26,053
Idaho	122,259	91,232	31,027
Wyoming	59,585	46,004	13,581
Colorado	229,196	176,697	52,499
New Mexico	148,978	121,496	27,482
Arizona	139,244	111,557	27,687
Utah	153,648	114,917	38,731
Nevada	25,[illegible]	19,525	5,619
Pacific	2,413,323	1,855,589	557,734
Washington	400,867	308,870	91,997
Oregon	255,032	188,786	66,246
California	1,757,424	1,357,933	399,491

*The Biennial Survey of Education: 1949-50.

TABLE X

NUMBER OF PUPILS ENROLLED IN NON-PUBLIC (PRIVATE AND PAROCHIAL) SCHOOLS BY STATE: 1949-50*

State by Region	Total Elementary and Secondary	Total Elementary including Kindergarten	Total Secondary
Continental U. S.	3,380,139	2,707,777	672,362
New England	397,592	285,061	112,531
Maine	35,721	24,661	11,060
New Hampshire	26,612	19,989	6,662
Vermont	15,301	9,207	6,094
Massachusetts	212,026	149,397	62,629
Rhode Island	42,449	30,947	11,502
Connecticut	65,483	50,860	14,623
Middle Atlantic	1,026,016	849,206	176,810
New York	499,775	415,824	83,951
New Jersey	169,233	141,234	27,999
Pennsylvania	357,008	292,148	64,860
East North Central	913,221	747,112	166,109
Ohio	198,032	162,367	35,664
Indiana	68,661	57,830	11,821
Illinois	311,398	258,255	53,143
Michigan	190,052	145,328	44,723
Wisconsin	144,078	123,321	20,757
West North Central	323,223	259,757	63,466
Minnesota	86,071	71,731	14,340
Iowa	57,784	45,698	12,086
Missouri	96,777	76,139	20,638
North Dakota	11,730	9,385	2,345
South Dakota	11,280	9,595	1,685
Nebraska	29,503	22,633	6,870
Kansas	30,078	24,576	5,502

The Biennial Survey of Education: 1949-50

TABLE X (Continued)

NUMBER OF PUPILS ENROLLED IN NON-PUBLIC
(PRIVATE AND PAROCHIAL) SCHOOLS BY STATE: 1949-50*

State by Region	Total Elementary and Secondary	Total Elementary including Kindergarten	Total Secondary
South Atlantic	170,403	129,303	41,100
Delaware	9,019	7,255	1,764
Maryland	69,808	57,564	12,244
Virginia	19,282	12,401	6,881
West Virginia	10,527	7,567	2,221
North Carolina	7,329	5,108	1,411
South Carolina	4,830	3,389	1,411
Georgia	10,326	6,357	3,969
Florida	21,092	15,513	5,579
Dist. of Columbia	18,190	14,149	4,041
East South Central	99,501	72,727	26,774
Kentucky	54,171	41,694	12,477
Tennessee	15,799	9,177	6,622
Alabama	17,190	12,109	5,081
Mississippi	12,341	9,747	2,594
West South Central	180,702	150,926	29,776
Arkansas	8,073	6,056	2,017
Louisiana	85,286	72,542	12,744
Oklahoma	11,103	8,606	2,497
Texas	76,240	63,722	12,518
Mountain	65,356	51,816	12,540
Montana	11,929	9,290	2,639
Idaho	3,764	3,175	589
Wyoming	1,509	1,277	232
Colorado	21,384	16,151	5,233
New Mexico	16,472	14,320	2,152
Arizona	7,113	5,195	1,918
Utah	2,019	1,395	624
Nevada	1,166	1,013	153
Pacific	204,125	161,869	42,256
Washington	28,386	21,614	6,772
Oregon	17,108	13,071	4,037
California	158,631	127,184	31,447

*The Biennial Survey of Education: 1949-1950.

TABLE XI

COMPARISON OF ENROLLMENT BY GRADE IN NON-PUBLIC ELEMENTARY SCHOOLS AND IN PUBLIC ELEMENTARY SCHOOLS IN CITIES, FOR SPECIFIED YEARS*

Grade	Non-public schools		Non-public schools		Per cent of total enrollment by grade, in city public schools	
	1932-33		1940-41		1931-32	1939-40
	Enrollment	Per Cent	Enrollment	Per Cent		
Total	1,756,497	100.0	2,153,279	100.0	100.0	100.0
Kindergarten	39,949	2.3	57,341	2.8	6.0	5.6
First	232,976	13.3	269,153	12.5	15.2	14.0
Second	220,574	12.5	253,690	11.7	12.6	12.0
Third	229,458	13.1	255,542	11.8	12.1	11.9
Fourth	228,149	13.0	264,873	12.3	11.9	12.0
Fifth	222,087	12.6	270,016	12.6	11.8	11.5
Sixth	210,268	12.0	268,675	12.5	11.0	11.4
Seventh	193,869	11.0	266,578	12.3	10.4	11.5
Eighth	164,679	9.4	244,786	11.4	9.0	10.1
Unclassified	14,488	0.8	2,625	0.1		

* The Biennial Survey of Education, 1940-42.

The transportation element in parochial schools presents a unique situation in the school system. The legal question pertaining to transportation of public school pupils is quite different from that of transporting parochial school pupils. The former is based primarily upon the legislative intent in the degree of discretionary authority delegated to local boards of education, while the latter mainly concerns the constitutionality of legislation designed to expend public funds for sectarian purposes.

In practically every state there is a provision in its constitution which prohibits the appropriation of public funds for religious purposes. Regardless of the reason, these constitutional provisions have not always been interpreted by some legislatures and some courts as prohibiting the providing of transportation of children to parochial schools.

Numerous decisions have been handed down by the high courts in which the legality of such transportation has been challenged. In the earlier cases, the courts declared such practices unconstitutional. Even in the latest cases which upheld the constitutionality of such action, strong dissenting opinions are often given.

State ex rel Van Straten v. Milquet[59] was a leading early case involving the right of a school board, in the absence of a permissive statute, to provide transportation for parochial pupils. The constitution in Wisconsin required free non-sectarian instruction. The

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[59] 180 Wis. 109, 192 N. W. 392 (1923).

court ruled that the school board was not authorized to expend public funds and a contract made by the board to provide transportation to a parochial school was invalid.

Another equally important case[60] of the early period was decided in New York. There the court ruled decisively that free transportation of pupils to non-public schools was an "indirect" aid to denominational schools and was therefore unconstitutional.

In the same year that the New York case was decided, the first contrasting opinion was handed down in a Maryland case.[61] Here it was agreed that free transportation to parochial schools was an aid to the school, but not in sufficient degree to prohibit the legislative body from providing transportation for parochial pupils.

Often there were conflicting decisions handed by various state courts and there was quite a bit of confusion among the different jurisdictions particularly affecting transient students.

It was not until 1947 that the United States Supreme Court was presented with a school transportation case.[62] In a five-to-four decision the court declared constitutional a New Jersey law which provided for transportation of parochial pupils at public expense. It ruled that the New Jersey statute neither violated the "due process" clause of the Fourteenth Amendment nor the First Amendment.

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60 Judd v. Bd. of Education, 278 N.Y. 200, 15 N.E. 2d 576 (1939).

61 Bd. of Education v. Wheat, 174 Md. 314, 199 A. 628 (1938).

62 Everson v. Board of Education, 330 U. S. 1 (1947).

The United States Supremem Court decision was not interpreted to sanction the expenditure of public funds for parochial pupil transportation without specific provisions in the statute to do so. In the same year the Pennsylvania Supreme Court ruled that a statute providing for free transportation for any pupil to and from "public schools" authorized only transportation of "public school pupils" and not "parochial school pupils."[63] Two years later the Supreme Court of Washington interpreted a statute providing for transportation for "all children" to mean "all children in public school" only and not "children attending parochial schools."[64] The majority opinion pointed out the fact that free transportation of children in parochial schools did constitute financial support for a "religious establishment" and was a violation of the state constitution.

There is a lack of recent litigation on the issue of providing transportation for parochial schools and the legality of transporting parochial pupils appears to be settled for the time being. Since the United States Supreme Court's ruling that the practice does not violate the federal constitution the individual states apparently have the right to control the matter by their constitutions and statutes.

It is sufficient to say, at this point, that the transportation

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63 Connell v. Board of School Directors, 356 Pa. 585, 52 A. 2d 645 (1947).

64 Visser v. Nooksack Valley District, 33 Wash. 2d 699, 207 P. 2d 198 (1949).

problems in our school systems are varied and complex. There is no one answer to the problems because of the different circumstances which exist among the various states and even within an individual state. Where one method would be ideal in one jurisdiction it would be anything but ideal in another. Also there are disagreements as to which solution is good or bad. This can be attested to by the disagreements among the various courts. Expert study and effort must be exerted in each jurisdiction.

V. HEALTH

Every pupil who is compelled to attend school is also required to submit to and abide by all the health regulations of the state wherein he resides. Most of these regulations will not be discussed in this study for the reason that they are not related to compulsory school attendance.

An examination of portions of statutes of a seemingly typical state, Virginia, reveals that the compulsory attendance statute has no effect on children affected with a contagious or infectious disease.[65]

> All pupils . . . shall receive as part of the educational program such examinations, health instruction and physical training as shall be prescribed by the State Board and approved by the State Board of Health . . .[66]

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[65] Va. Code §22-253 (1950).

[66] Va. Code §22-243 (1950).

Every pupil must submit to whatever training the State Board may prescribe. If a pupil does not, he will be dismissed and will be guilty of violation of the compulsory attendance law.

One of the most difficult problems of school administration in regard to health regulations is that of the legality of the requirement by a board of education or other agency, that all pupils be vaccinated as a prerequisite to admittance to school. The question has been litigated in state after state but practically every year one or more cases concerning this question reach the highest courts of a state.

Virginia's statute on vaccination is typical for the many states:

> . . . every pupil . . . shall . . . furnish a certificate . . . that such pupil has been successfully vaccinated, or the board shall . . . proceed to have such child vaccinated when the parent, guardian or other person having such child under his control fails or neglects to do so within the time specified.[67]

The first case in which the Supreme Court of the United States decided the constitutionality of a state statute requiring vaccination was not one involving pupil vaccination. It was a Massachusetts statute giving the board of health of a city or town the authority to require vaccination of all inhabitants when, in its opinion, such vaccination was necessary for the public health or safety. The defendant in Jacobson v. Massachusetts[68] refused to be vaccinated and

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[67] Va. Code §22-249 (1950).

[68] 197 U. S. 11, 25 S. Ct. 25 (1905).

was being prosecuted under the state statute. Mr. Jacobson contended that he was being deprived of his liberty when a state subjects him to punishment for refusal to submit to vaccination; also, that a man has the inherent right to care for his own body and health in such manner as he chooses. Therefore, he contended, the statute was unconstitutional.

The court agreed that the defendant was being deprived of his liberty, but went on to say:

> . . . But the liberty secured by the Constitution . . . does not import an absolute right in each person to be, at all times and in all circumstances, wholly free from restraint. There are manifold restraints to which every person is necessarily subject for the common good . . . The court has more than recognized it as a fundamental principle that persons and property are subjected to all kinds of restraints and burdens in order to secure the general comfort, health, and prosperity of the state . . .[69]

This statement of principle settled the constitutionality of compulsory vaccination as far as the federal constitution is concerned.

Massachusetts later enacted a common compulsory vaccination law for school children. In Commonwealth v. Childs[70] a father was prosecuted under the compulsory attendance law for failing to keep his child in school. The defendant contended that he was ready and willing to send his child to school but the school would not admit him unless he be vaccinated which the father would not permit. Here we have one law requiring school attendance and another law forbidding it, except upon certain conditions. The court in disposing of the defense and uphold-

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[69] 197 U. S. 11, 25 S. Ct. 25 (1905).

[70] 299 Mass 367, 12 N. E. 2d 814 (1934).

ing the conviction said:

> The statutory obligation to cause children to attend school involves an obligation to put them in condition to attend, and cannot be escaped by neglect to qualify them for attendance.[71]

A new and an old objection to the compulsory vaccination laws were posed in a recent Arkansas case. The State Board of Health required vaccination as a condition to school attendance. In Seubold et al. v. Fort Smith School District[72] a father sued the board to force admittance of his child to school. He contended that the rule was unreasonable, arbitrary and capricious and thus beyond the power of the Board. Also, despite the decision in the Jacobson case, he urged that the rule violated the Fourteenth Amendment. The court held that the rule was reasonable. It also held that no constitutional right of the child had been violated and cited the Jacobson case.

Another argument was advanced in a recent Kentucky case. In Mosier v. Barren County Board of Health[73] certain parents argued that their religious beliefs prevented them from permitting foreign substances to be injected into their veins. In overruling this defense, the Kentucky court said:

> . . . Religious freedom embraces two conceptions, freedom to believe and freedom to act. The first is absolute, but, in the nature of things, the second

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71 Ibid.

72 ___Ark.___, 237 S. W. 2d 884 (1951).

73 308 Ky. 829, 215 S. W. 2d 967 (1948).

> cannot be . . . One may have any religious belief desired, but one's conduct remains subject to regulation for the protection of society.[74]

The courts have not upheld the compulsory vaccination laws in all states under all conditions. For example the Illinois statute provides that the state board of health, shall have general supervision of the health of the state citizens. The Supreme Court of Illinois held, in Lawbaugh v. Board of Education,[75] this statute did not give the state board the authority to make compulsory vaccination rules for school children without a showing that smallpox was prevailing in the community.

As noted before, children having a physical or mental disability are exempt from compulsory attendance laws. Such exemption is undoubtably exercised in good faith in many cases, but it also opens the door wide for abuses through which parents and children can escape the mandatory provisions of a compulsory attendance statute through some feigned or pretended illness or infirmity. How wide the loophole is depends upon the state's administrative practice and procedure.

In a few states this general exemption granted to those who are mentally or physically incapable is narrowed somewhat by setting up schools for blind and deaf children and requiring children with these infirmities to attend such schools.

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[74] 308 Ky. 829, 215 S. W. 2d 967 (1948).

[75] 177 Ill. 572, 52 N. E. 850 (1899).

CHAPTER III

SUMMARY

It has been the object of this study to discover the common elements and differences, and the effects thereof, in provisions for compulsory school attendance as they appear in constitutional requirements, statutory enactments and court decisions in the several states.

A study of the state constitutions, statutory enactments, and in particular, the court decisions of the various states indeed show that there are common elements and differences in compulsory school attendance laws of the several states of the United States.

As has been indicated there is only a slight variation in the wording of the laws of the different states as to the beginning and leaving ages of children in schools. The usual minimum age of compulsory education is seven in a majority of the states while the leaving age is sixteen. Even in the minority of the states where the beginning age is younger or older, the leaving age is usually fixed so that the required time spent in school is the same as that required in the states where the beginning age is seven and the leaving age is sixteen. Thus, the required amount of time to be spent in school is generally the same in all states.

Nearly all states permit some type of home instruction. Before home or private instruction is allowed, the private tutor must meet the standards set up by the state boards of education. As a

general rule the qualifications for home tutoring are interpreted so that private instruction in content is not inferior to that given in public schools. A few states either by statute or court decision disallow home tutoring. In states which disallow home tutoring by statute there are conflicting decisions handed down by courts of different states as to whether a home can be interpreted as a school.

In the states which allow instruction in the home either by statute or by court decision, the elements such as content and quality of instruction, as well as the qualifications of the instructor are considered. In states which disallow home tutoring these same elements are considered but more importance is attached to the element of the child's attendance in a school and his associations with other pupils and teachers.

In the area of pupil transportation there are two elements which are common to all states. They concern the use of school funds to provide transportation and the distance a pupil must live from school before he will be provided with free transportation.

As a general rule school funds may not be used for pupil transportation without express authorization. One exception to this is found where pupil transportation is necessarily implied from a related compulsory attendance statute. Even with express authorization for free pupil transportation, such statutes are consistently strictly construed by the courts. Thus, it can be stated that with the strict statutory construction given by the courts, funds authorized for school transportation will not be permitted to be used

for any purpose other than that specifically permitted by statute.

The other common element of pupil transportation concerns which pupils are eligible for free school transportation. The statutory provisions for pupil transportation vary from state to state as to the distance a pupil must live from school before he will be provided with free transportation to and from school. A majority of states specify by statute the distance in miles a pupil must live before he will receive free transportation. Due to differences in transportation facilities, highways and traffic conditions, and other factors the required minimum distance from school approaches no uniformity throughout the several states. For example, one state may provide transportation to a pupil if he lives one-half mile from school while another state will not provide transportation for a pupil unless he lives four or more miles from school.

A minority of states do not specify the miles a pupil must live from school but make provisions for pupil transportation on the basis of "reasonable" or "unreasonable" distance from school. Statutes of this type provide the courts with a constant stream of litigation because there has been and continues to be a dispute as to what is a reasonable or an unreasonable distance. Most litigation concerning pupil transportation occurs in this group of states having an indefinite distance statute.

All states have provisions for health regulations in the schools. They are necessary and are generally accepted as being

so as indicated by the court decisions which unanimously uphold these provisions on the ground that they are a valid exercise of the police power of the state.

One element of school health, in particular, that is common to a great majority of the states is the statutory requirement of vaccination as a prerequisite for admission to public schools. Although the courts continually uphold most of these vaccination statutes, more cases appear every year contesting their validity.

In conclusion it may be said that the compulsory attendance laws express a simple, but important, concept which prevails throughout this country. This concept is that the sovereign has a paramount interest in the education of its citizens, to which the claims of the parents regarding control of their children must yield.

Although there are differences in provisions of compulsory attendance laws of the various states for carrying out the promotion of the general intelligence of the people, there are also common provisions in the attendance laws. Where differences occur, the decisions of the state courts have pointed out that differences in statutory provisions are usually due to conflicting educational philsophies and peculiar conditions existing in each state.

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